



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: SEP 23 2004

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly warranted
invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a retail store for women's apparel and footwear. It seeks to employ the beneficiary permanently in the United States as a buyer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief, copies of previously submitted evidence, and additional new evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$810.00 per week, which amounts to \$42,120 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of December 1996.

On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of \$400,000, and to currently employ two workers. In support of the petition, the petitioner submitted its tax returns for 1998 through 2001 and a copy of the petitioner's unaudited financial statements for the year ending December 31, 2002.

From 1998 to August 9, 2000, the petitioner was structured as a sole proprietorship and filed its tax returns through the sole proprietor's U.S. Individual Income Tax Return on Form 1040, reporting its profit and losses on an accompanying Schedule C. From that point onwards, the petitioner was structured as an S corporation and reported its taxable income on Form 1120S.

The petitioner's tax returns reflect the following information for the following years while it was structured as a sole proprietorship:

1998

1999

Proprietor's adjusted gross income (Form 1040)	\$50,623	\$96,289
Petitioner's gross receipts or sales (Schedule C)	\$262,314	\$485,893
Petitioner's wages paid (Schedule C)	\$4,045	\$9,765
Petitioner's net profit from business (Schedule C)	\$54,403	\$116,355

The petitioner's tax returns reflect the following information for the following years while it was structured as an S corporation:

	<u>2000</u>	<u>2001</u>
Net income ¹	\$119,298	-\$3,496
Current Assets	\$112,587	\$52,468
Current Liabilities	\$94,040	\$41,795
Net current Assets	\$18,547	\$10,673

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 29, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested evidence pertaining to 2002.

In response, the petitioner submitted its Form 1120 Corporate tax returns for the petitioner for 2002. The tax return reflects the following information:

	<u>2002</u>
Net income	\$55,629
Current Assets	\$68,308
Current Liabilities	\$21,957
Net current Assets	\$46,351

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 27, 2003, denied the petition.

On appeal, counsel asserts that the attacks on September 11, 2001 caused the petitioner to report one year of losses, along with many other retail stores in the San Diego area. The petitioner submits letters from nine other San Diego-based retailers, a letter from [REDACTED] Executive Director of the Discover Pacific Beach Business Improvement Association; a letter from [REDACTED] Certified Management Accountant; and literature pertaining to the petitioner such as magazine articles and promotional materials. Counsel also cites *Matter of Sonegawa*, 12 I & N Dec. 612 (BIA 1967), as applicable precedent to the instant petition.

¹ Ordinary income (loss) from trade or business activities as reported on Line 21.

At the outset, the unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Thus, the petitioner's unaudited financial statements for the year ending December 31, 2002 will not be considered.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, although the beneficiary indicated on the ETA 750 that he has been employed by the petitioner since 1996, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1998, 1999, 2000, 2001, or 2002.² Thus, the petitioner did not establish a *prima facie* demonstration of its ability to pay the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The sole proprietor reported net (adjusted gross) income of \$50,623 and \$96,289 in 1998 and 1999, respectively. These figures cover the proffered wage of \$42,120 each year. During the two years that the petitioner was structured as a sole proprietorship, 1998 and 1999, it functioned as a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can

² The director never sought evidence pertaining to the petitioner's actual employment of and payment of wages to the beneficiary. However, the burden of proof and production of evidence remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of one, as indicated on his individual tax returns. In 1998, the sole proprietorship's adjusted gross income of \$50,623 covers the proffered wage of \$42,120 but only leaves the sole proprietor with \$8,503 to live upon for the year. It is improbable that the sole proprietor could support himself on \$8,503 for an entire year in San Diego, California, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. In 1999, the sole proprietorship's adjusted gross income of \$96,289 covers the proffered wage of \$42,120 and leaves the sole proprietor with \$54,169 to live upon for the year. It is probable that the sole proprietor could support himself on \$54,169 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. However, the director erred in not seeking the sole proprietor's expenses. Without evidence of the sole proprietor's expenses, it is impossible to clearly and comprehensively evaluate whether or not the sole proprietor's adjusted gross income provides enough income for him as well as covering the proffered wage. Absent this evidence, the AAO is inclined to determine that it is unclear whether or not the petitioner demonstrated its ability to pay the proffered wage in 1998 out of its adjusted gross income, but that the petitioner successfully demonstrated its ability to pay the proffered wage in 1999 out of its adjusted gross income.³

During the years that the petitioner was structured as an S corporation, 2000, 2001, and 2002, it reported net income of \$119,298, -3,496, and \$55,629, respectively. The net income in 2000 and 2002 are greater than the proffered wage of \$42,120. Thus, the petitioner established its ability to pay the proffered wage out of its net income in 2000 and 2002. However, the petitioner has not established its ability to pay the proffered wage out of its net income in 2001.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's net current assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities

³ The petitioner did not present evidence of the sole proprietor's assets during 1998, which would have been evaluated towards the petitioner's demonstration of its ability to pay the proffered wage.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable,

are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during 2001, however, were only \$10,673, which is an amount less than the proffered wage of \$42,120. As such, the petitioner failed to establish its ability to pay the proffered wage out of its net current assets in 2001.

The petitioner has established its ability to pay the proffered wage in 1999, 2000, and 2002. The petitioner has not established its ability to pay the proffered wage in 1998 and 2001. Counsel states that 2001 was an unusual year for the petitioner based on the unforeseen attacks on the United States causing a decline in consumer purchases of retail apparel. Many retail stores corroborate counsel's assertions with their letters submitted on appeal. She references *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), as supportive of her assertions.

Matter of Sonegawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

The question is whether or not the year 2001 was an uncharacteristically unprofitable year for the petitioner during a history of profitable years. [REDACTED] letter, dated August 16, 2003, states that his company, Century Small Business Solutions, is "responsible for recording the company's financial transactions." He goes on to state the following:

Based on the company's financial history, it is clear that the destruction of consumer confidence resulting from tragic events of September 11, 2001 was the reason that [the petitioner] reported negative income in the year 2001. Furthermore, based on [the petitioner's] history of success and growth, it is clear that [the petitioner's] loss reported in 2001 was a one-time occurrence due to clearly extraordinary circumstances which affected nearly all businesses nationwide.

....

By reviewing [the petitioner's] financial statements for the years 1998 to present, we can see how the 2001 sales figures for [the petitioner] were severely impacted. From 1998 to 1999 the company tripled its earnings from about \$26,000 to about \$96,000. From 1999 to 2000 it generated an additional 57% increase in earnings to about \$151,000.

short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The September through December sales of [the petitioner] in 2001 represented a 56% decrease from the same period during 2000. At their historical gross profit margin, this \$141,000 decrease in sales resulted in lost profit of about \$64,000. This occurred during the peak, holiday sales season for this store.

Please note that we represent other retail businesses in the San Diego area, and I can confirm that these other entities experienced the same type of unprecedented financial losses as a result of the September 11, 2001 tragedy.

....

[The petitioner's] recovery and financials give every indication that the company's loss in 2001 was an isolated event as were the attacks on our nation. Its ability to sustain the damage of the consequences of September 11, 2001, recover and rebound is testament to the commitment of the ownership and staff and to the financial strength of this company.

In support of [redacted] assertions, the petitioner also presented unaudited operating statements from October, November, and December 1999, 2000, and 2001, prepared by Mr. Todd's firm, to show the unusual decline in total sales in 2001 as compared to the prior years.

Many of the retail companies' letters state that their shopper traffic and sales were significantly reduced from its typical figures in October, November, and December 2001. Another letter from [redacted] Management, dated August 14, 2003, states that "[a]s a lessor of retail space, I can confirm that my tenants suffered huge decreases in sales volume as a direct result of the attacks." [redacted] letter, dated August 13, 2003, states that as executive director of Discover Pacific Beach Business Improvement Association, located in San Diego, California, their "mission is to promote and revitalize Pacific Beach physically and economically." She states that her association has 1,200 businesses in her district and she speaks to business owners and managers everyday. She also states that the attacks on September 11, 2001 "devastated the retail industry," and "[h]oliday sales throughout San Diego were severely depressed that year. Business owners told me sales were 'down by over 50%'."

Counsel presents a compelling argument with sufficient corroborative evidence that *Sonegawa's* facts are analogous to the petitioner's financial situation. Considering the totality of circumstances and after a review of the evidence in its entirety, including but not limited to, the petitioner's consistently substantial gross sales and receipts and net profits posted from 1999 through 2000 and in 2002, the AAO might exercise favorable discretion and find in the petitioner's favor, however there is insufficient evidence pertaining to 1998, the year of the petition's priority date, at which time the petitioner must show an ability to pay the proffered wage in addition to the continuing obligation.

The petitioner submitted evidence sufficient to demonstrate that it has the ability to pay the proffered wage during 1999 through 2002. The problematic aspect to finding in the petitioner's favor at this point in the proceeding is the lack of evidence concerning the petitioner's financial situation in 1998. The director failed to obtain the sole proprietor's monthly expenses for a more comprehensive evaluation of the petitioner's ability to pay the proffered wage in 1998. The director must afford the petitioner reasonable time to provide evidence pertinent to this issue, remaining mindful that sole proprietors may also present evidence of personal assets, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's July 27, 2003 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.